

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1232

to be argued by
HOWARD F. CERNY

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

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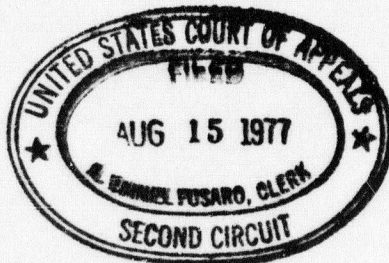
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

CARMINE ROTOLO,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern
District of New York.

REPLY BRIEF OF DEFENDANT — APPELLANT



HOWARD F. CERNY
Attorney for Defendant-Appellant
200 Park Avenue
New York, New York, 10017
(212) 867-1300

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Statement of Facts.....	2
Point One.....	3
Point Two.....	7
Conclusion.....	8

TABLE OF CASES CITED

	<u>Page</u>
Robert v. United States, 416 F.2d 1216.....	5
United States v. Jackson, 526 F. 2d 1236.....	5, 6
United States v. King, 521 F. 2d 356.....	6
United States v. Nichols, 401 F.Sup. 1377.....	5, 6
United States v. Peoni, 100 F.2d 401...	3
United States v. Stevens, 521 F.2d 334.....	6

STATUTES CITED

	<u>Page</u>
18 U.S.C.....	1, 7
21 U.S.C. 802(11)	6
21 U.S.C. 841(a)(1)	1, 5
21 U.S.C. 846	1

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For the Second Circuit

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UNITED STATES OF AMERICA :

Plaintiff-Appellee, :

vs. :

Docket No. 77-1232

CARMINE ROTOLO :

Defendant-Appellant. :

PRELIMINARY STATEMENT

The Appellant, Carmine Rotolo, has appealed from his Judgement of Conviction and Sentence entered in the United States District Court for the Eastern District of New York (Pratt, J.) on January 6, 1977. The Defendant/ Appellant, Carmine Rotolo, ("Rotolo") was convicted of one count of conspiracy in violation of Title 21, United States Code, Section 846 (USC). The remaining 6 counts were convictions of violations of Title 21 USC Section 841 (a) (1) by virtue and the use of Title 18 USC, Section 2. The substantive counts under Narcotics Statute alleged that Rotolo was a principal in this distribution, possession and sale of a controlled substance on August 5, September 9, 1974 and on March 10, 1975. The dates alleged in the superseding indictment are the

dates of sale by the co-conspirators De Metrio and Irace. There is no allegation that Rotolo actively participated on the alleged sales. The government's responsive briefs and their statements at the time of trial concede that Rotolo did not actively engage in any possession of narcotics or their sale and distribution within the jurisdiction of the Eastern District of New York.* The jury convicted Rotolo of three counts of possession and three counts of knowingly and intentionally selling the narcotics to agent Garcia on August 5, September 9, 1974 and on March 10, 1975.

STATEMENT OF FACTS

The government's brief argues that an alleged sale of a controlled substance made by Rotolo to De Metrio in April of 1974 was the source of De Metrio's sale in August and September of 1974 to agent Garcia. It additionally argues, that a sale in early March by Rotolo to De Metrio was the source of De Metrio's sale to agent Garcia on March 10, 1975 (The US 2 and 3). The government concedes no actual participation or actual possession by Rotolo on the dates contained in the indictment. The present convictions are based solely on a charge of conspiracy and aiding and abetting. Rotolo noted in its primary brief (Page 13n5) the question of why Rotolo was not directly charged with possession and distribution rather than going through

* Numerals preceded by the prefix Tr. will refer to the transcript; numerals preceded by the letter A will refer to the appendix; numerals preceded by the appendix AB will refer to the Appellant's brief on appeal; numerals preceded by the letters US will refer to the government's responsive briefs.

the involved trial under consideration. However, the court should be aware that the U.S. attorney for the Eastern District would not have had venue over the sale and possession which occurred in the county of New York.

Subsequent to Rotolo's filing the primary briefs the government by motion has succeeded in changing the content of the original transcript and was granted permission to file a late appendix. Under these circumstances Rotolo was deprived of his right to adequately brief the aiding and abetting charge in his primary briefs. That aiding and abetting charge will be answered in this reply brief. However the Defendant Rotolo maintains that the changing of the transcript without additional time to file a primary brief on these charges is a violation of his statutory and constitutional rights.

POINT ONE

THE GOVERNMENT'S PROOF ON THE SUBSTANTIVE COUNTS WAS INSUFFICIENT TO SUPPORT A CONVICTION AND THE COURT'S REFUSAL TO DISMISS THE INDICTMENT WAS AN ERROR.

The government theory is that the possession of a controlled substance by De Metrio and Irace was in fact possession by Rotolo pursuant to Title 18 Section 2. In addition, they argue that De Metrio's sale to government agent Garcia was a sale by Rotolo. The government does not dispute that the application of Section 2 is governed by Judge Hand's opinion in the United States v. Peoni, 100F. 2d 401 which states:

" In order to aid and abett another to commit a crime it is necessary that a defendant 'demandthat he in some sort of associate himself with the venture, that he participates in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' All the words used-- even the most colorless,

"abet"--carry on implication of purposive attitude towards it."

The implication of Judge Hand's decision is clear and unequivocal. Rotolo must have in some sort associated himself with the actual venture, that he participate in it, that it was something that he wished to bring about, i. e. the sale of narcotics to Agent Garcia. Keeping in mind the time lapse between the alleged sale by Rotolo to De Metrio the Court's acceptance that this was a venture and an act that Rotolo actively participated in borders on a willing suspicion of reason. Assuming, arguendo, the sale of narcotics by Rotolo to De Metrio how does this prove Rotolo's association with the sale, months later, to Agent Garcia. If in fact, Rotolo did sell narcotics to De Metrio, the action was completed and De Metrio took possession of the drugs and if there was any distribution, it was a distribution by De Metrio. Rotolo's original brief completely outlines the nature of De Metrio's possession, his dominion over the alleged drugs his right to modify them, change them and to sell them where he wished. The very facts proved by the government disprove any dominion and control by Rotolo over the drugs, if another party other than De Metrio had dominion and control over the drugs it was the government's Agent Frankie Mambo. There is no evidence in this case proving that Rotolo ever possessed or distributed narcotics on the days in question within the Eastern District of New York. In fact, the government concedes in its brief that it is planning some type of "constructive" possession by Rotolo and some type of "derivative criminal liability" by Rotolo based on the actual possession and distribution by De Metrio. What the government and the Court below and the government in its responsive brief failed to realize "a person cannot aid and abet

a crime which has already been completed." Robert v. United States, 416 F.2d 1216. If Rotolo ever possessed drugs or if he ever distributed them they were not the basis of the indictment in this case, the jury was not charged as to that crime and the jury returned no verdict on that issue.

The 6 substantive counts allege violation of Title 21, Section 841 (a) (1) of the United States Code. However, in practicality they allege two separate and distinct crimes: (1) the possession of narcotics; and (2) the distribution of those narcotics. That possession and distribution being De Metrio's. It is submitted that Rotolo cannot be convicted of the possession and distribution of narcotics solely in the control of third parties when he did not exercise any dominion or direction over those narcotics. The record is absolutely void as to any proof that the parties actually in possession of the narcotics were under the control or influence of Rotolo, a necessary item of proof to prove possession. United States v. Nichols, 401 F. Sup.1377.

The government's use of a "chattel mortgage" falls far short of the exercise of dominion and control which constitutes our conception of possession. Since possession is not defined under the act, it must be defined with reference to its common law meanings.

The mere fact that De Metrio may have owed money for the alleged purchase of narcotics does not constitute possession by Rotolo. Although some form of constructive possession has been recognized by our courts in these type of cases, the mere owing of money does not constitute that constructive possession. United States v. Jackson, 526 F. 2d 1236.

Likewise, Rotolo's conviction under the distribution analysis must also be reversed. The term "distribute" is defined in Title 21, Section 802 (11). It means to deliver. It should require no citation of the authority for this court to conclude that before Rotolo can deliver something he must be in possession of it. It is the actual physical delivery that constitutes distribution.

Finally, Rotolo's conviction of both the possession and intent to distribute concepts of Title 21 must be reversed. It has been held over over, that this section cannot be violated by aiding and abetting both possession and intent to distribute. The government must elect and the jury must be so charged that the defendant cannot be convicted of aiding and abetting possession and distribution. United States v. Nichols 401 F. Sup.1377; United States v. Stevens 521 F.2d, 334, United States v. King 521 F.2d 356; United States v. Jackson, Supra.

In summary, Rotolo's convictions on the substantive counts 2 through 7 must be reversed on the following grounds. That Rotolo never actually possessed the narcotics on days and time and at the places alleged in the indictment. Further, the government's reliance on constructive possession was illconceived and not proved. That Rotolo did not actually physically distribute the narcotics nor did he direct or control their distribution. Finally, that Rotolo cannot be convicted on both possession and distribution pursuant to the aiding and abetting clause of Title 18.

POINT TWO

ROTOLO'S RIGHTS PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE HAVE BEEN VIOLATED.

Rotolo's primary appeal was prepared and filed based on the transcript as it existed at that time. Subsequent to the filing service of Rotolo's appendix and brief, the government moved for and successfully amended the transcript. This amendment eliminated an important point of Rotolo's primary brief and brought forth the issue of aiding and abetting. Rotolo promptly filed a motion with this court requesting an extension of time to file a supplemental brief, which was denied. This reply brief, in the very few days that Rotolo was permitted has attempted to raise the issue of aiding and abetting. However, Rotolo's right to appeal has been rendered illusory since his time to properly prepare his brief was frustrated by the government and this court. A right to appeal implies the right to appeal from a correct transcript and the right to have the time permitted by statute. The government's action and this court's concurrence in changing the transcript after the filing of Rotolo's brief and the failure of this court to grant an extension of time to file a supplemental brief has violated Rotolo's rights to appeal. This reply brief in the few days given for its preparation was forced to concentrate on the peripheral areas of aiding and abetting. It was unable therefore to properly reply to the government's extensive brief.

It is respectfully suggested that the court set this case down for re-argument and grant to Rotolo adequate time to prepare a supplemental brief and a proper reply brief.

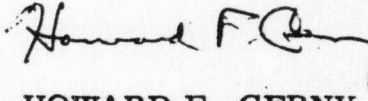
CONCLUSION

The judgement of conviction should be reversed and the indictment dismissed or, in the alternative, in the interest of justice a new trial should be ordered. Further, in the alternative, that this case be set down for re-argument and the defendant, Carmine Rotolo be given adequate time to prepare a primary and reply brief.

Dated: New York, New York

August 15, 1977

Respectfully submitted,



HOWARD F. CERNY
Attorney for Defendant-Appellant
200 Park Avenue
New York, New York 10017
(212) 867-1300

AFFIRMATION OF SERVICE BY MAIL

ROMEO JULIUS BARROS, an attorney admitted to practice in the State of New York, affirms under the penalty perjury, that affirmant is not a party to the action, is over 18 years of age and resides at 153 East 43rd Street, New York, N. Y. 10017. That on the 15th day of August, 1977, affirmant served the within REPLY BRIEF on the Hon. David G. Trager, United States Attorney, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a post office under the exclusive care and custody of the United States post office department within the State of New York.

Affirmed on

August 15, 1977

Romeo Julius Barros
Romeo Julius Barros

